UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 40

Docket No. PH-0752-10-0507-I-1

Steve A. Miller,

Appellant,

v.

United States Postal Service,

Agency.

March 23, 2012

W. Philip Jones, Esquire, Avon, Connecticut, for the appellant.

Lori L. Markle, Esquire, Philadelphia, Pennsylvania, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed the appellant's demotion. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal to the Northeastern Regional Office for further adjudication of this appeal and issuance of a new initial decision.

BACKGROUND

¶2 Effective June 19, 2010, the agency demoted the appellant from a position as an EAS-21 Postmaster at the agency's Uniontown, Pennsylvania Post Office (Uniontown) to a position as an EAS-17 Supervisor, Customer Service at the

agency's Greensburg, Pennsylvania Post Office. Initial Appeal File (IAF), Tab 6, Subtab 4B at 1-2. The agency's action was based on a charge of improper conduct and supported by three specifications. *Id.*

¶3 In the first specification, the agency alleged that, after the appellant began an extramarital affair with Sheila Ritenour, he accepted Ms. Ritenour as a transfer to Uniontown as a Temporary Rural Carrier (TRC). IAF, Tab 6, Subtab 4H at 1. The agency further alleged that, subsequently, based on his personal relationship with Ms. Ritenour, the appellant hired her as a Temporary Employee (TE), selecting her over 11 other candidates who came for an interview.[1] *Id.* In the second specification, the agency alleged that, while Ms. Ritenour was employed at Uniontown, the appellant gave her preferential treatment by: providing her additional training that was not afforded to other new employees; providing her personal training by going out on the route with her; and reassigning her to another office rather than firing her despite Ms. Ritenour's failure to make her street time on her delivery route. *Id.* In the third specification, the agency alleged that the appellant's improper conduct exposed the agency to liability as a result of a sexual harassment claim that Ms. Ritenour filed after her affair with the appellant ended. *Id.*

¶4 The appellant filed an appeal with the Board denying the charge and raising affirmative defenses of harmful procedural error and discrimination based on sex. IAF, Tabs 1, 14. Following the appellant's requested hearing, the administrative judge issued an initial decision that reversed the agency's action based on her finding that the agency did not prove its charge by preponderant evidence. IAF,

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[1] The agency also alleged in the notice of proposed demotion that the appellant admitted during his February 3, 2010 pre-disciplinary interview that he had arranged for Ms. Ritenour to be transferred to Uniontown as a TRC, and later hired her as a TE based on his personal, dating relationship with Ms. Ritenour. IAF, Tab 6, Subtab 4H at 1. In its decision letter on the proposed demotion, the agency noted that the appellant denied hiring Ms. Ritenour based on his personal relationship with her. *Id.*, Subtab 4B at 1.

Tab 35, Initial Decision (ID) at 1-8. The administrative judge also found that the appellant failed to prove his affirmative defenses. *Id.* at 8-14.

¶5 The agency has petitioned for review and the appellant has responded in opposition to the petition but he has not filed a cross petition for review.[2] Petition for Review (PFR) File, Tabs 3, 5.

ANALYSIS

Specification 1

¶6 In finding that the agency failed to prove this specification by preponderant evidence, the administrative judge stated, "While it is clear and undisputed that at the time the appellant selected [Ms.] Ritenour, they were dating, I find based on the evidence produced that [Ms.] Ritenour was the only candidate remaining on the list of eligibles." ID at 3. The agency argues on review that the administrative judge erred by prohibiting it from introducing material evidence on this matter. PFR File, Tab 3 at 13. In particular, the agency alleges that the administrative judge improperly excluded from evidence the application packages of the candidates who interviewed for the TE position. *Id.*, *see* IAF, Tab 26 at 2-3.

¶7 We find the agency's objection to the administrative judge's exclusion of the application packages from evidence unavailing. Because the agency did not object to the administrative judge's ruling on this matter during the proceedings below, it is precluded from challenging the administrative judge's ruling on review. *See Ludlum v. Department of Justice*, 87 M.S.P.R. 56, ¶ 8 (2000) (because the agency's representative did not preserve an objection to the

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[2] The administrative judge ordered the agency to provide interim relief if it filed a petition for review of the initial decision. ID at 15. With its petition for review, the agency has provided satisfactory evidence of compliance with the interim relief order and the appellant has not complained about interim relief. Petition for Review File, Tabs 3, 5. Accordingly, we have not addressed this issue further.

administrative judge's ruling excluding certain evidence, he could not so object for the first time on review), *aff'd*, 278 F.3d 1280 (Fed. Cir. 2002). Further, the Board has held that "[t]o obtain reversal of an initial decision on the ground that the [administrative judge] abused his discretion in excluding evidence, the petitioning party must show on review that relevant evidence, which could have affected the outcome, was disallowed." *Jezouit v. Office of Personnel Management*, 97 M.S.P.R. 48, ¶ 12 (2004), *aff'd*, 121 F. App'x 865 (Fed. Cir. 2005). While the agency appears to contend that the application packages are material to the issue of whether Ms. Ritenour was the only candidate remaining on the list of eligible candidates when the appellant hired her as a TE, *see* PFR File, Tab 3 at 13, these packages, which were created in June and July of 2009, would not have shed any light on the candidates' availability on or about October 17, 2009, when the appellant hired Ms. Ritenour as a TE. *See* IAF, Tab 6, Subtab 4H. Thus, the agency's argument that the administrative judge erred by excluding from evidence the application packages of the other 11 candidates for the TE position fails to provide a basis for granting review. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981).

¶8 On petition for review, the agency also notes that the administrative judge denied its request to call Human Resources Specialist Nancy A. Morris to testify regarding the hiring for the TE position. PFR File, Tab 3 at 13. It is unclear, however, whether the agency is contending that the administrative judge's ruling denying Ms. Morris as a witness constitutes error. We note that the agency's proffer regarding Ms. Morris's expected testimony is vague and does not indicate that Ms. Morris would have testified about whether Ms. Ritenour was the only candidate remaining on the list of eligible candidates when the appellant hired her for the TE position. *See* IAF, Tab 23 at 14. Further, in its petition for review, the agency does not argue that Ms. Morris would have provided such testimony. In any event, the agency did not object to the administrative judge's ruling denying

Ms. Morris as a witness and is, therefore, precluded from doing so on review. *Tarpley v. U.S. Postal Service*, 37 M.S.P.R. 579, 581 (1988).

¶9 The agency also argues on review that, in finding that the agency failed to prove specification 1, the administrative judge erred in relying on her finding that "[Ms.] Ritenour was the only candidate remaining on the list of eligible candidates when the [a]ppellant hired her [for the TE position]" because this finding was based on a critical misstatement of the hearing testimony of Uniontown supervisor Gary Helfer. PFR File, Tab 3 at 13. We agree. In the initial decision, the administrative judge based her conclusion that the agency failed to prove this specification, in part, on her finding that "[Ms.] Ritenour was the only candidate remaining on the list of eligibles [for the TE position]." ID at 3. In making this finding, the administrative judge relied on Mr. Helfer's testimony, which she summarized as follows: "[A]ccording to Mr. Helfer, everyone else on the list had already obtained other employment, or they were no longer available." *Id.*

¶10 As the agency notes on review, however, Mr. Helfer did not make such a statement. PFR File, Tab 3 at 13. While Mr. Helfer testified that the appellant *claimed* that he hired Ms. Ritenour because she was the only candidate left on the hiring list, IAF, Tab 33, Hearing Transcript (HT) at 52, he offered no testimony that supported the appellant's proffered explanation for hiring Ms. Ritenour as a TE. Thus, it appears that the administrative judge based her finding that the agency failed to prove specification 1, at least in part, on her misinterpretation of Mr. Helfer's testimony.

¶11 Based upon a review of the evidence, however, we find that the administrative judge's misstatement of Mr. Helfer's testimony does not provide a basis to disturb the administrative judge's finding that the agency failed to prove that the appellant hired Ms. Ritenour as a TE based on his personal relationship with her, as specification 1 alleged. Even assuming that Ms. Ritenour was not the only person remaining on the list of eligible candidates for the TE position at the

time the appellant hired her as a TE, the availability of other candidates for the TE position does not mean that the appellant selected Ms. Ritenour for the position based on his personal relationship with her. In that regard, we note that the agency offered no evidence that, at the time the appellant selected Ms. Ritenour for the TE position, any candidates who interviewed for the position who were better qualified than the appellant were available.

¶12 We further note that, in specification 1, it appears that the agency alleged that the appellant acted improperly in two respects: (1) by accepting Ms. Ritenour's transfer to Uniontown as a TRC after he had begun engaging in an extramarital affair with her; and (2) by subsequently hiring Ms. Ritenour as a TE based on his personal, dating relationship with her. IAF, Tab 6, Subtab 4H at 1. In her discussion of specification 1 in the initial decision, the administrative judge seemed to conflate Ms. Ritenour's transfer to Uniontown with her selection for the TE position. On remand, the administrative judge should make explained findings with respect to both aspects of specification 1.

Specification 2

¶13 In the second specification, the agency alleged that the appellant gave Ms. Ritenour preferential treatment in three respects: (1) he afforded her additional training that was not afforded to other new employees; (2) he provided her personal training by going out on the route with her; and (3) although Ms. Ritenour was unable to make her street time on her delivery route, the appellant reassigned her to another office instead of firing her. IAF, Tab 6, Subtab 4H at 1.

¶14 The Board has held that an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). If any of these items is missing or substantially incomplete, the Board will remand the appeal to the administrative

judge for modification. *Colbert v. U.S. Postal Service*, 93 M.S.P.R. 467, ¶ 7 (2003) (citing *Spithaler*, 1 M.S.P.R. at 589).

¶15 The agency argues on review that the administrative judge failed to state whether the agency proved specification 2. PFR File, Tab 3 at 12, 14. In the initial decision, the administrative judge summarized the hearing testimony regarding this specification, ID at 4-6, and concluded as follows: "In weighing the evidence presented, I find there is substantial evidence that [Ms.] Ritenour was treated differently than other new employees in regards to training. However, neither the testimony nor agency training records show that [Ms.] Ritenour received any additional training from either the appellant or at his direction," ID at 7. Assuming arguendo that this statement is tantamount to a finding that the agency failed to prove the allegation that the appellant afforded Ms. Ritenour preferential treatment with respect to training, that allegation is only part of specification 2. As noted above, specification 2 also alleged that the appellant afforded Ms. Ritenour preferential treatment by reassigning her to another office instead of firing her. *See* IAF, Tab 6, Subtab 4H at 1. The administrative judge did not make any findings with respect to this allegation nor did she make a finding as to whether the agency proved specification 2.

¶16 In the initial decision, the administrative judge implies that, because she found that the agency failed to prove specifications 1 and 3 by preponderant evidence, the charge could not be sustained and, therefore, it was unnecessary for her to determine whether the agency proved specification 2 by preponderant evidence. ID at 7-8. The administrative judge stated as follows: "Specifically, I find the agency's evidence does not support the allegations in specifications one and three. Therefore, I find the agency failed to prove the charge of improper conduct by a preponderance of the evidence. Accordingly, I find the charge is not sustained." *Id.*

¶17 It is well established, however, that where, as here, there is one charge with multiple factual specifications set out in support of the charge, proof of one or

more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army*, 918 F.2d 170, 172 (Fed. Cir. 1990). Thus, an agency can meet its burden of proof on its charge on the basis of proof of only one supporting specification. *Crawford-Graham v. Department of Veterans Affairs*, 99 M.S.P.R. 389, ¶ 19 (2005). Because proof of one specification is sufficient to prove the charge as a whole and the administrative judge here did not make a finding on whether the agency proved specification 2, we remand this appeal for the administrative judge to make the required findings.

¶18 The agency also argues on review that the initial decision does not attempt to explain the basis of the administrative judge's credibility determinations. PFR File, Tab 3 at 12, 18. An initial decision must resolve issues of credibility. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). Moreover, the Board has held that, in resolving credibility issues, an administrative judge must explain in detail why one version of events was more credible than the other version. *Id.*

¶19 As the administrative judge's summary of the hearing testimony regarding specification 2 shows, the witnesses at the hearing provided conflicting testimony with respect to whether Ms. Ritenour received additional training from the appellant or at his direction. *See* ID at 4-5. For example, the appellant testified that Acting Supervisor John Cooper was responsible for either training employees or assigning a trainer; Rural Route Carrier Peggy Marcinek testified that the appellant, not Mr. Cooper, instructed her to train Ms. Ritenour; and Mr. Helfer testified that, while Mr. Cooper assigned the training for Ms. Ritenour, Mr. Cooper would not have assigned training without it first being directed by the appellant. *See id.* This conflicting testimony created a credibility issue that the administrative judge was required to analyze and resolve. In resolving this issue, however, the administrative judge only stated that she found that the testimony did not show that Ms. Ritenour received additional training from the appellant or at his direction. ID at 7. She did not "explain in detail" why she found the

testimony that the appellant was not responsible for Ms. Ritenour's training more credible than the testimony to the contrary. On remand, the administrative judge should make explained credibility determinations in deciding whether the agency proved specification 2 by preponderant evidence.

Specification 3

¶20 In specification 3, the agency alleged that the appellant's improper conduct exposed the agency to liability as a result of a sexual harassment claim that Ms. Ritenour filed when her affair with the appellant ended. IAF, Tab 6, Subtab 4H. In analyzing this specification, the administrative judge stated that "as to the specification pertaining to sexual harassment, it is a matter of [Ms.] Ritenour's allegations versus the appellant's sworn testimony denying that he sexually harassed [Ms.] Ritenour." ID at 7. The administrative judge found that Ms. Ritenour's statement that the appellant sexually harassed her "lacks probative value" and that "absent more probative and credible evidence . . . the agency failed to support specification number 3 as part of the improper conduct charge." *Id.*

¶21 While the administrative judge apparently interpreted specification 3 as alleging that the appellant sexually harassed Ms. Ritenour, the agency did not so charge. Rather, the agency in specification 3 alleged that the appellant's improper conduct exposed the agency to liability because of Ms. Ritenour's sexual harassment claim. IAF, Tab 6, Subtab 4H; PFR File, Tab 3 at 17. Thus, specification 3 pertains to the gravity of the appellant's misconduct. Although the gravity or seriousness of an appellant's misconduct is one of the factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), for determining the appropriateness of the penalty, it is not misconduct. Consequently, we find that specification 3 does not support the improper conduct

charge, but rather is appropriate in considering the penalty if the charge is sustained.[3]

ORDER

¶22 Accordingly, we VACATE the initial decision and REMAND the appeal for further adjudication and issuance of a new initial decision consistent with this Opinion and Order.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.

[3] Notably, in this specification, the agency did not charge the appellant with having an improper relationship with Ms. Ritenour but, rather, focused on the ramifications of that relationship, i.e., Ms. Ritenour's sexual harassment claim. The appellant could not control the actions of a third party, however, and thus Ms. Ritenour's decision to file a complaint cannot be considered misconduct by the appellant. If the agency had charged the appellant with the underlying misconduct over which the appellant did have control, we could review that as alleged misconduct but, as explained above, the agency did not so charge in specification 3.